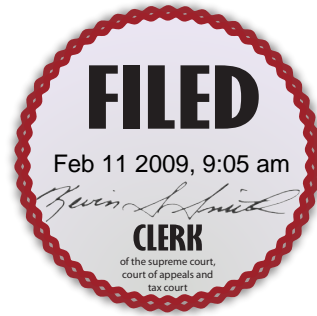


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JORDAN BRANDON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0806-CR-571

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APPEAL FROM THE MARION SUPERIOR COURT

The Honorable Robert R. Altice, Judge

Cause No. 49G02-0712-MR-270693

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**February 11, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

### Case Summary and Issue

Jordan Brandon appeals his conviction following a jury trial of one count of murder, a felony, and one count of robbery, a Class C felony. For our review, Brandon raises a single issue, which we restate as whether the trial court erred when it refused to give Brandon's tendered jury instruction on involuntary manslaughter as a lesser included offense of murder. Finding no error, we affirm.

### Facts and Procedural History

On December 17, 2007, Monika Jaeger left her job at the Alzheimer Association in Indianapolis and went to her home in the Chelsea Village apartment complex to eat lunch and walk her Labrador retriever. When she did not return to work, her co-workers became concerned and contacted the apartment complex office staff. The office staff searched Jaeger's apartment and found her body lying on the floor in the downstairs half-bathroom. The door of the bathroom was closed and the exhaust fan had been turned on. Jaeger's winter jacket was pulled up over her head, and she was wearing a scarf and gloves. Her shirt had been pushed up exposing her breasts and her pants had been unbuttoned, unzipped, and pulled down to just below her pubic line. Jaeger's body was covered with a sheet apparently taken off of the living room couch. A belt was found on the floor beside Jaeger, but the belt buckle was found near the front door. Autopsy results showed evidence of injuries to Jaeger's face, head, right forearm, right shoulder, and both knees, and indicated asphyxiation due to strangulation as the cause of death.

Brandon skipped school on December 17, 2007. Kevin Kalinke, a maintenance employee of the apartment complex, watched Brandon disappear behind an apartment

building carrying a backpack and reappear without the backpack around 9:45 a.m. Kalinke retrieved Brandon's backpack and secured it in the apartment complex offices. Around 2:45 p.m., Kalinke watched Brandon again as he walked near a dumpster at the apartment complex. As Kalinke heard the sirens of approaching emergency vehicles responding to the discovery of Jaeger's body, Brandon sprinted away.

Physical evidence including fingerprints, DNA evidence and footprints placed Brandon at the crime scene, and linked him to property removed from Jaeger's purse. Brandon lied to police when they questioned him about the crime, stating that he had gone to school that day and had lost his backpack at school. On the basis of this evidence, the State charged Brandon with murder and robbery on December 20, 2007. The trial court held a jury trial on May 12 and 13, 2008.

In his opening statement, counsel for Brandon presented his own version of the altercation between Brandon and Jaeger arguing that Brandon did not intentionally kill Jaeger and that he should be convicted of an offense less than murder. Brandon did not present any evidence in his defense except for a stipulation that Jaeger did not go to work on the Friday before her murder. At the close of evidence, Brandon tendered three jury instructions on the crimes of voluntary manslaughter, involuntary manslaughter, and reckless homicide. The trial court rejected all three instructions finding that the evidence did not support the instructions. The jury convicted Brandon of murder and robbery, a Class A felony. The trial court then reduced the robbery conviction to a Class C felony and sentenced Brandon to terms of sixty years for the murder and four years for the robbery to be served concurrently. Brandon now appeals.

## Discussion and Decision

### I. Standard of Review

The trial court held a hearing on Brandon's tendered instructions after the close of evidence and determined that the evidence presented did not support giving the instructions. We review the trial court's decision to refuse to instruct the jury on lesser included offenses for an abuse of discretion when the trial court makes a finding as to the existence or lack of a serious evidentiary dispute. See Brown v. State, 703 N.E.2d 1010, 1019 (Ind. 1998) (establishing abuse of discretion standard of review if the trial court performed a factual analysis of the proposed instruction and a de novo standard of review if the trial court performed a legal analysis).

### II. Involuntary Manslaughter Instruction

Brandon challenges only the trial court's refusal to give his tendered instruction on involuntary manslaughter.

When a defendant requests an instruction covering a lesser-included offense, a trial court applies the three-part analysis set forth in Wright v. State, 658 N.E.2d 563, 566-67 (Ind. 1995). The first two parts of the Wright test require the trial court to determine whether the offense is either inherently or factually included in the charged offense. If it is, the trial court must determine whether there is a serious evidentiary dispute regarding any element that distinguishes the two offenses. If a jury could conclude that the lesser offense was committed but not the greater, then it is reversible error for a trial court not to give an instruction, when requested, on the inherently or factually included lesser offense.

Roberts v. State, 894 N.E.2d 1018, 1028 (Ind. Ct. App. 2008) (citations and quotations omitted), trans. denied.

A person who knowingly or intentionally kills another human being commits murder. Ind. Code § 35-42-1-1. A person who kills another human being while

committing or attempting to commit battery commits involuntary manslaughter. Ind. Code § 35-42-1-4(c)(3). The defendant's intent – the intent to kill or the intent to batter – distinguishes murder from involuntary manslaughter. Wilson v. State, 765 N.E.2d 1265, 1271 (Ind. 2002). Involuntary manslaughter is not an inherently lesser included offense of murder. Roberts, 894 N.E.2d at 1029. However, involuntary manslaughter is a factually included lesser offense if the charging instrument alleges that a battery accomplished the killing. Wilson, 765 N.E.2d at 1271.

The charging information here alleged Brandon “did knowingly kill another human being, namely: Monika Jaeger, by physically assaulting the person of Monika Jaeger, thereby inflicting mortal injuries upon Monika Jaeger, causing Monika Jaeger to die.” Appellant's Appendix at 30. Assuming, without deciding, that the charging instrument alleges that Brandon killed Jaeger by means of a battery, we hold that no serious factual dispute exists regarding Brandon's intent to kill Jaeger.

The evidence presented at trial established that Jaeger died from asphyxia as a result of being strangled. The pathologist who performed the autopsy testified that in order to asphyxiate Jaeger, Brandon would have needed to strangle her for at least two minutes. The pathologist also testified that strangulation for as little as thirty seconds would cause unconsciousness. Brandon argues that because there is no direct evidence of exactly how Jaeger died, the jury could have concluded that Brandon choked Jaeger without intending to kill her, but that she died as a result of the choking.

There was no evidence presented that Brandon intended only to batter Jaeger. In his opening statement, counsel for Brandon gave his own version of Jaeger's death.

Counsel stated that Brandon entered Jaeger's apartment through the unlocked sliding glass door; Jaeger returned home and found Brandon in her apartment; a confrontation ensued, and Brandon choked Jaeger until she stopped shouting; and then Brandon dragged her body into the bathroom. Aside from being mere conjecture, Brandon's counsel's opening statements are not evidence. See McIntyre v. State, 717 N.E.2d 114, 123 (Ind. 1999). In addition, no evidence presented at trial supports the facts alleged by Brandon's counsel in his opening statement.

On the contrary, there was considerable evidence that Brandon intended to kill Jaeger. Choking someone for thirty seconds to two minutes clearly evinces intent to kill that person, or at least a high probability that death would result. See Erlewein v. State, 775 N.E.2d 712, 715 (Ind. Ct. App. 2002). In addition, Brandon carefully hid Jaeger's body so that it could not be discovered easily by dragging it into a small bathroom, covering it with a sheet, and closing the door.<sup>1</sup> Brandon made no attempt to resuscitate Jaeger; instead, he exposed her naked body. Finally, Brandon did not call 911 to request medical assistance for Jaeger. All of this evidence establishes that Brandon intended to kill Jaeger, or at least his understanding that there was a high probability his actions would result in her death.

In light of the significant evidence that Brandon intended to kill Jaeger and the complete lack of any evidence to the contrary, we hold the trial court did not abuse its discretion in determining no serious evidentiary dispute existed and refusing to give

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<sup>1</sup> Indeed, during the initial inspection of Jaeger's apartment by maintenance employees, Jaeger's body was mistaken for a mannequin. The maintenance employees were accustomed to seeing mannequins in apartments because of the close proximity of an art school.

Brandon's involuntary manslaughter instruction. Therefore we affirm Brandon's conviction for murder.

### Conclusion

The trial court did not err when it refused to give Brandon's tendered jury instruction on involuntary manslaughter as a lesser included offense of murder.

Affirmed.

CRONE, J., and BROWN, J., concur.